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IN THE

Supreme Court of The United States

OCTOBER TERM, 1988

Town of Rye, New Hampshire,
Petitioner

v.

Public Service Company of New Hampshire,
The State of New Hampshire
Department of Transportation and
Town of Hampton Falls, New Hampshire
Respondents

On Writ of Certiorari to the Supreme Court of New Hampshire

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION
BY ITS ATTORNEYS

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QUESTION PRESENTED FOR REVIEW

May a locality refuse to accede to the installation of a particular emergency warning system proffered by a nuclear plant operator as a part of that plant's proposed Radiological Emergency Response Plan?

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ON WRIT OF CERTIORARI TO THE
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of New Hampshire Department of Transportation, a respondent herein, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the New Hampshire Supreme Court's Opinion in this case. That Opinion is reported at 130 N.H. 365, 540 A.2d 1233 (1988) and is reproduced at pp. 38-50 of the Petition in the Appendix.

STATEMENT OF THE CASE

Respondent Public Service Company of New Hampshire (hereinafter "PSNH") is a public utility and one of the joint owners of the Seabrook Nuclear Generating Station (hereinafter "Seabrook Station") in Seabrook, New Hampshire. Respondent State of New Hampshire Department of Transportation (hereinafter "NHDOT") is the state agency responsible for the design, construction, maintenance, and operation of the interstate and state highway systems in New Hampshire.

The Town of Rye, New Hampshire and the Town of Hampton Falls, New Hampshire are municipalities located within a ten mile radius of Seabrook Station and are therefore within the emergency planning zone for which PSNH has prepared a Radiological Emergency Response Plan (sometimes hereinafter "RERP") as required by federal regulation and state law. As a part of its Radiological Emergency Response Plan for Seabrook Station, PSNH developed a public alerting and notification system consisting of sirens placed on utility poles to be located in and along public highways in several communities within the emergency planning zone, including the Towns of Rye and Hampton Falls.

New Hampshire law authorizes and establishes a procedure for licensing the placement of utility poles and attachments and appurtenances thereto in public highways. See generally, N.H. Rev. Stat. Ann. §231:160 *et seq.* N.H. Rev. Stat. Ann. §231:160 provides, *inter alia:*

> Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways ... .

N.H. Rev. Stat. Ann. §231:161 states that petitions for pole licenses concerning town-maintained highways shall be addressed to the selectmen of the town in which such highway is located. N.H. Rev. Stat. Ann. §231:161,I(a). Exclusive jurisdiction over the disposition of utility pole license petitions in

State-maintained highways is delegated to the New Hampshire Commissioner of Transportation. N.H. Rev. Stat. Ann. §231:161,I(c)(supp).

In July 1984, PSNH submitted pole license applications pursuant to N.H. Rev. Stat. Ann. §231:160 *et seq.* for the installation of utility poles with attached sirens on roads maintained by the Town of Rye and NHDOT. In September, 1984 both petitioner Town of Rye and respondent NHDOT granted the licenses and PSNH proceeded to install the siren poles in accordance with the approvals it had received.

Thereafter, the Town of Rye wrote a letter to PSNH purporting to revoke the pole licenses which had been previously issued. The Town ordered PSNH to cease and desist from any further installation of poles in Rye and to remove any poles that had been installed, including those on State highways.

To enforce its order, the Town of Rye, on January 20, 1986, filed a Petition for Declaratory Judgment with prayers for specific performance against PSNH in the Superior Court of the State of New Hampshire, seeking the removal of the siren poles that had been installed within the limits of both town and State highways. The gravamen of the complaint was that N.H. Rev. Stat. Ann. §231:160, the statute authorizing the erection of utility devices in public highways, did not specifically include within its terms the specialized siren poles installed by PSNH and further that the installation of the siren poles required approval of the town.

Subsequently, the Town of Hampton Falls moved to join the Petition for Declaratory Judgment brought by the Town of Rye. It alleged that PSNH had installed poles and warning sirens within its municipal limits contrary to the wishes of the Town as expressed in a 1984 Town meeting vote and also contrary to the express order of the Hampton Falls Selectmen.

On March 31, 1986, PSNH filed its Answer to Petition for Declaratory Judgment. PSNH responded by stating that the siren poles were required by federal law in order for Seabrook Station to receive an operating license and that they were an

integral part of the Radiological Emergency Response Plan formulated by the State of New Hampshire. In addition, PSNH answered that the Town had no authority to regulate the installation of any utility poles located within State-maintained highways and that the Town of Rye had improperly attempted to revoke the utility pole license previously issued by it.

In response to the allegations set forth in the Motion of Hampton Falls to join the Petition for Declaratory Judgment, PSNH responded that it had received permission from the State of New Hampshire to install the poles and sirens on State highways, pursuant to N.H. Rev. Stat. Ann. §231:160 *et seq.* and that further permission from the Town was not required.

On November 13, 1986, a hearing was held before the Superior Court sitting in Rockingham County, New Hampshire. In an Order dated November 26, 1986, the trial court identified the ultimate issue to be determined as "whether RSA 231:160 et seq. authorizes the town and/or State to issue pole licenses for purposes related to this siren warning system." The Superior Court determined that the New Hampshire Department of Transportation was a necessary party to the proceedings and directed the issuance of Orders of Notice requiring NHDOT to file a formal answer to the Petition. (See Appendix to Petition, pp. 22-26).

On December 16, 1986, NHDOT filed an Answer asserting that the licenses which were the subject of the litigation were authorized by N.H. Rev. Stat. Ann. §231:160 and that the Commissioner of Transportation had exclusive jurisdiction over the disposition of such licenses for utility devices located within State-maintained highways.

On January 20, 1987, the Superior Court held that N.H. Rev. Stat. Ann. §231:160 was not broad enough to authorize the installation of the siren poles within public highways and

that the licenses granted to PSNH by the Town of Rye and NHDOT were therefore null and void. (See Appendix to Petition, pp. 27-37).

On appeal, the New Hampshire Supreme Court considered the following questions:

1. Are utility poles carrying sirens, which are part of a warning system required by Federal Regulation for Seabrook Station, within the class of electric poles, structures and appurtenances entitled to placement in public ways under RSA 231:160?

2. May selectmen revoke or refuse to issue permits for utility installations under RSA 231:159 et seq. merely because they do not want such installations in the town or because they oppose the project with which the installations are associated?

3. Does a vote of a town forbidding cooperation with radiological emergency response planning for Seabrook Station prohibit the State from permitting associated utility installations in State highways within a town?

On March 29, 1988 the Supreme Court of New Hampshire reversed the judgment of the trial court. Its opinion addressed all three questions presented above. (See Appendix to Petition, pp. 38-50). The New Hampshire Supreme Court held that the warning sirens were "attachments" within the meaning of N.H. Rev. Stat. Ann. §231:160 and §231:161,VI and therefore the trial court had erred in ruling that the pole licenses had been granted without statutory authority. In addressing the second question presented above, the New Hampshire Supreme Court stated that:

> The Selectmen of Rye lack authority to revoke the licenses they granted to PSNH, or to deny applications for licenses to erect three siren poles on town-maintained highways for any reason other than a reason relating to "the safe, free and convenient use for public travel of the highway ...," which is the criterion for the exercise of the selectmen's authority

> under the statute; and no safety-based justification for the revocation was articulated by the town. RSA 231:168.

Appendix to Petition, p. 47.

In addressing question three, *supra*, concerning the efficacy of a town vote forbidding cooperation with the Radiological Emergency Response Plan for Seabrook Station, the New Hampshire Supreme Court relied upon its previous decision in *Vernet v. Town of Exeter*, 129 N.H. 34, 523 A.2d 48 (1986), and stated that:

> Similarly, RSA 231:159 *et seq.* do not give a town veto power over the erection of siren poles, pursuant to a RERP. Hampton Falls lacked authority to prohibit either cooperation by selectmen with radiological emergency response planning for Seabrook Station, or construction by PSNH on State highways in Hampton Falls of any installations necessary for the implementation of a RERP.

Appendix to Petition, p. 48.

On April 21, 1988, the New Hampshire Supreme Court denied the Town of Rye's Motion for Reconsideration. (See Appendix to Petition, p. 51).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE INVOLVES NO SUBSTANTIAL FEDERAL QUESTION.

The question presented for review by the petitioner is whether a municipality may refuse to permit the installation of an emergency warning system proposed by a nuclear plant operator as a part of its radiological emergency response plan. This issue, however, purportedly based on federal law, was never actively raised by the petitioner, was never litigated by the parties, and was not decided by the New Hampshire Supreme Court in the case below.

This case has been, from the start, a state law case. The primary focus of both the petitioner and the State courts has been whether the PSNH siren poles were properly licensed under State law. As the trial court noted in its order of January 20, 1987:

> The ultimate issue to be determined is whether R.S.A. 231:160 *et seq.* authorizes the towns and/or the State to issue pole licenses for the erection of poles for purposes related solely to this siren warning system.

Appendix to Petition, page 30.

The exclusively state law character of the case carried over during the appeal to the New Hampshire Supreme Court. The three issues presented on appeal (*supra*, at page 5) all involve the extent of authority granted by New Hampshire law to the petitioner and the respondents with respect to the licensing and installation of the siren poles. In addressing these issues, the New Hampshire Supreme Court was directed to[1] and relied exclusively upon state statutory and common law grounds. The New Hampshire Supreme Court neither considered nor decided any question of federal law. Indeed, other than a reference to the Nuclear Regulatory Commission's requirement that a nuclear plant operator develop a radiological emergency response plan, the New Hampshire Supreme Court's opinion does not recite or rely upon any federal statute. In particular, the New Hampshire Supreme Court did not cite, or decide any issue arising under, the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011 *et seq.* Neither did the State court consider any issue relating to the preemptive effect of the provisions of the Atomic Energy Act upon State law.

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[1] It is noteworthy that the petitioner did not cite any federal case or statute in its brief on appeal to the New Hampshire Supreme Court.

Thus, contrary to the assertion of petitioner (Petition, page 7-8), this case has never involved nor required the construction and interpretation of the Atomic Energy Act.

II. THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT RESTS UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The holding of the New Hampshire Supreme Court was that:

> ... the trial court erred in ruling that the pole licenses had been granted without statutory authority and hence were null and void, and in ordering PSNH to remove the poles and sirens which PSNH had erected and placed in Rye and Hampton Falls.

Appendix to Petition, page 50.

This holding is based entirely upon the Court's construction of N.H. Rev. Stat. Ann. §231:160-161 and also its interpretation of its own prior case law, particularly *Vernet v. Town of Exeter*, 129 N.H. 34, 523 A.2d 48 (1986). Thus, even if this case involved any federal question, it is clear that the New Hampshire Supreme Court's decision was based upon independent and adequate state law grounds that preclude this Court's review. *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).

III. THE NEW HAMPSHIRE SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY FEDERAL RIGHT OR ANY PRIOR FEDERAL COURT DECISION.

In its decision, the New Hampshire Supreme Court held that N.H. Rev. Stat. Ann. §231:160-161 authorized the NHDOT to license the siren poles at issue, and also that the same statutes did not empower the petitioner to veto the erection of the siren poles proposed by PSNH as a part of its Radiological Emergency Response Plan. This decision did not violate any federal right of the petitioner, nor did it conflict with prior federal court decisions.

The petitioner claims a right, purportedly guaranteed by federal statutes and case law, to refuse to allow the installation of emergency warning sirens for a nuclear power plant within its local jurisdiction. This supposed right does not exist, however, as the cases cited by the petitioner in support of it are wildly inapposite. Petitioner's principal authority, *Citizens for an Orderly Energy Policy v. Suffolk County*, 604 F.Supp. 1084 (E.D.N.Y. 1985), aff'd. 813 F.2d 570 (1987), held only that a county's refusal to participate in radiological emergency planning for a nuclear power facility was not preempted by the Atomic Energy Act. This case cannot reasonably be read as authority for a local government's "right" to actively regulate a nuclear plant operator's implementation of its Radiological Emergency Response Plan. Indeed, in ruling that the County's inaction did not conflict with federal law, the court made it clear that the kind of affirmative action contemplated by petitioner herein was preempted:

> Certainly the County may not require LILCO to comply with the County's requirements for a satisfactory RERP; whether LILCO's RERP is sufficient is a question for the NRC and the County may not override the NRC's judgment.

Citizens for an Orderly Energy Policy, supra, at 1094.

The petitioner's reliance on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) is also misplaced. In *Silkwood*, this Court held that a state-authorized award of punitive damages for injuries arising out of the escape of plutonium from a nuclear facility was not preempted by the Atomic Energy Act. The Court's conclusion that Congress intended that state tort remedies be available to parties injured by nuclear accidents, even though federal law entirely occupied the field of nuclear safety regulation, lends no support to the petitioner's claimed right to reject a component of a state-and federally-mandated radiological emergency response plan.

Indeed, the petitioner's claim that "a safety-related function is reserved for localities" (Petition, at page 19) is directly contrary to this Court's decisions. See *e.g.*, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). Based on the *Silkwood* and *Pacific Gas & Electric Co.* cases, it is abundantly clear that the petitioner has no federal right to take any action with respect to emergency warning sirens installed as a component of a utility's radiological emergency response plan.

In any event, the New Hampshire Supreme Court's decision in this matter is not in conflict with the above-cited cases. The State Court's holding that the petitioner was not authorized by the State utility pole licensing statute to overrule the siren pole licenses issued by NHDOT, or to revoke its own licenses for reasons other than those contemplated by the statute, is not in any way inconsistent with this Court's delineation of the relative roles of the state and federal governments with respect to the regulation of nuclear power.

CONCLUSION

The petitioner asserts that the resolution of this case will affect "the exercise of traditional authority of state and local governments, the regulation of nuclear power by the federal government, and the interaction between federal and local areas of regulation". Petition, at page 7. Despite these grandiose claims, this case has no such import.

The decision of the New Hampshire Supreme Court in this matter addresses no substantial federal question that would justify an assertion of this Court's jurisdiction under 28 U.S.C. §1257(3). That Court's decision is based entirely upon adequate state law grounds independent of any federal issue. The New Hampshire Supreme Court's decision is not in conflict with any established federal right, nor is it inconsistent with prior federal case law. Lacking any consideration of a substantial federal question, and any inconsistency with applicable

statutory and case law, the decision of the New Hampshire Supreme Court is jurisdictionally inappropriate for review by this Court.

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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